NO. 22682

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARTHA G. WHITFIELD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
[FORMERLY SOUTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION]

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I

STATEMENT OF JURISDICTION

On March 31, 1965, appellant was indicted in two counts by the Federal Grand Jury for the Southern District of California, Northern Division, for attempt to evade and defeat the payment of tax for the calendar years 1958 and 1959 in violation of Title 26, United States Code, Section 7201 [C.T. 1].[1/] Following a trial by jury before the Honorable Myron D. Crocker, United States District Judge, from October 26, 1965, to November 2, 1965, appellant Martha G. Whitfield was found guilty of both counts.

1/ "C.T." refers to Clerk's Transcript.

Appellant was convicted and sentenced on December 6, 1965, to the custody of the Attorney General for one year on each count, the sentences to run concurrently [C.T. 9].

Following an appeal to this Court, on September 11, 1967, the judgment of the District Court was affirmed [Whitfield v. United States, 383 F.2d 142 (9th Cir. 1967)]. The mandate of this Court was spread on November 6, 1967 [C.T. 12].

On November 8, 1967, appellant filed a Notice of Motion to Correct and Reduce Sentence [C.T. 18], and on November 22, 1967, appellant filed a Statement of Defendant's Motion with supporting affidavits [C.T. 26].

On December 18, 1967, a hearing was held on the motion to reduce [Reporter's Transcript], which was followed by the filing on January 8, 1968, of an Order Denying Defendant's Motion to Correct and Reduce Sentence [C.T. 66].

On January 15, 1968, appellant filed a timely Notice of Appeal [C.T. 67].

The District Court had jurisdiction under the provisions of Title 18, United States Code, Section 3231 and Rule 35 of the Federal Rules of Criminal Procedure.

This Court has jurisdiction to review the final decision pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATUTE INVOLVED

Rule 35 of the Federal Rules of Criminal Procedure provides:

> "The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law. As amended Feb. 28, 1966, eff. July 1, 1966."

III

QUESTIONS PRESENTED

1. Whether the District Court abused its discretion in denying appellant's motion for a reduction of sentence.

2. Whether appellant may attack pre-sentence

proceedings in a Rule 35 motion, and whether the trial court had jurisdiction of appellant's claim of an invalid conviction.

IV

STATEMENT OF FACTS

The facts of appellant's crimes are set out in detail in the appellee's brief filed in the direct appeal from conviction [No. 21465].

A brief synopsis of the facts is found in this Court's opinion, 383 F.2d 142, 144-45 (9th Cir. 1967) as follows:

* * * *

> "The records of her bank accounts were irreconcilable, and, after her first interview with the revenue agent, she destroyed motel reservation cards which might have either supported or undermined her contention that her business enterprise could not have produced the amounts of unreported income claimed by the Government to have been earned in 1958 and 1959. In the beginning, the appellant told the investigating agent that there had been no large amounts of cash on her premises during the period from 1948 through 1955 and that, if there had been any cash whatsoever on hand during that period, the amount would have been no more than nominal. She stated that her only inheritance was

from her husband, and she expressed her opinion that it was "unsafe" to keep large amounts of cash on hand. Afterward, when she knew that the investigation was underway and had consulted with her accountant, she first revealed her contention as to the existence of a cash hoard, stated that her deceased father had made large monetary gifts to her during his lifetime, and remarked that her husband had been distrustful of banks. In refutation, the Government offered proof that appellant's father had been supported by his county's relief fund throughout the period from 1946 to 1958, that he had no assets in those years beyond $125, and that, in a 1947 application for welfare benefits, he had represented that his income was $60 per month. Moreover, the Government proved that appellant visited her bank two or three times each week, exchanged small checks and currency of small denominations for $20, $50, and $100 bills, and seldom made a bank deposit. A bank teller testified that the appellant, as she made these exchanges, departed from the bank each week with between $900 and $1500 in bills of the larger denominations. Opposing appellant's representation that her deceased husband had distrusted banks, the Government presented bank statements revealing that he did in fact maintain bank accounts during his lifetime and that the deposited

amount in one of his savings accounts had reached $10,000."

This Court, in its earlier opinion stated at page 145:

"In submitting the case to the jury and in fixing punishment, he (the trial court judge) was apparently convinced, as we are convinced, that the appellant undertook to cheat her Government and that the jury ascertained the truth." (Emphasis added).

At the hearing which took place on December 18, 1967, on the Rule 35 motion, the District Court made the following comments:

"THE COURT: What would probation serve in this particular case; what purpose would it serve to grant probation?" [R.T. 9].[2/]

"THE COURT: My point is that that is what the probation officer had in mind in his report, that there is nothing that he can do to help Mrs. Whitfield. This isn't a case for rehabilitation, which is what the probation officer would be working on, so I think that that is what he had in mind.

"The matter of sentence is left up to me as to

2/ "R.T." refers to Reporter's Transcript.

whether to give her ten years or $20,000 fine and I just thought I was real lenient in only making it one year." [R.T. 11].

"THE COURT: But my question is, why probation? In other words, if you agree there is no rehabilitation indicated here and, of course, that's the probation officer's point, that where she doesn't admit she ever did anything wrong, there isn't anything to rehabilitate, so there isn't anything he can do and, further, probation has to be based upon trust and confidence and if she won't tell the truth to the probation officer or to the court, then there's no basis for probation.

"That's why I think your argument should be limited to no sentence or a jail sentence. I don't think probation is indicated at all. I don't see what the probation officer could do to help her. You haven't told me." [R.T. 12].

"THE COURT: She wasn't denied probation on that ground. She was denied probation on the basis that there wasn't anything the probation officer could do to help her. There wasn't anything he could do.

* * * *

"THE COURT: The probation officer just reached the conclusion that there wasn't anything he could do to help her when he said that probation should not be granted and you haven't told me anything

the probation officer could do to help Mrs. Whitfield in this case." [R.T. 13].

V

ARGUMENT

A. THERE WAS NO ABUSE OF DISCRETION IN THE DENIAL OF APPELLANT'S MOTION TO REDUCE HER SENTENCE.

Appellant appears to take the position that Judge Crocker abused his discretion by refusing to grant probation because appellant would not confess. Not only is there no authority cited for such a proposition, but the record is devoid of such reasoning on the Court's part. As the statement of facts, above, shows, Judge Crocker felt that probationary supervision would be time and energy wasted on appellant's behalf.

> ". . . [A]n appellate court has no authority either to reduce or modify a sentence or order the trial judge to do it on an appeal from a denial of a motion under Rule 35. Flores v. United States, 9 Cir., 1956, 238 F.2d 758; Beren v. United States, 9 Cir., 1953, 202 F.2d 440; Kimbaugh v. United States, 5 Cir., 1952, 199 F.2d 453." Bryson v. United States, 265 F.2d 9, 14 (9th Cir. 1959), cert. den. 355 U.S. 817.

B. APPELLANT CANNOT ATTACK PRE-SENTENCE PROCEEDINGS IN A RULE 35 MOTION AND THE TRIAL COURT HAD NO JURISDICTION TO ENTERTAIN AN ATTACK ON THE JUDGMENT ITSELF.

Appellant, in her motion, filed affidavits which violate the hearsay, best-evidence, and opinion rules of evidence. Nevertheless, the affidavits were used in an attempt to attack the judgment of conviction. Such matters were improper in a Rule 35 motion.

> ". . . Rule 35 . . . presupposes a valid conviction, Smith v. United States, 9 Cir. 287 F.2d 270. Its only function is to permit correction of an illegal sentence, not to reexamine other proceedings prior to the imposition of sentence. Hill v. United States, 368 U.S. 424, 430, 82 S.Ct. 468, 7 L.Ed. 2d 417. It follows that Rule 35 is not available for setting aside the sentences . . . on the ground that he was not validly convicted on those counts." Redfield v. United States, 315 F.2d 76, 81 (9th Cir. 1963).

Not only was the attack on the conviction improper as part of a Rule 35 motion, there was no jurisdiction in the trial court to consider the conviction. Title 28, United States Code, Section 2255 provides authority for collateral attack on a conviction of a person in custody. Section 2255 is available only to attack a sentence under which a prisoner is in custody. Heflin v.

United States, 358 U.S. 415 (1959); Migdal v. United States, 298 F.2d 513 (9th Cir. 1961). Since appellant was not, and is not, in custody, the trial court could not consider the conviction itself.

VI.

CONCLUSION

For the above stated reasons the final decision of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Ronald S. Morrow
RONALD S. MORROW